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SUBJECT: DEBATE SURFACES OVER MARTIAL LAW LEGITIMACY

1. (SBU) Summary: On August 31, the appellate panel of the Supreme Court stayed for two months the August 29 High Court judgment that had nullified the fifth amendment to the constitution. The fifth amendment validated promulgation of martial law after the 1975 assassination of President Sheikh Mujibur Rahman and actions by the subsequent governments, redefined socialism, replaced secularism with conviction to faith in God, and restored multi-party democracy, press freedom and the partial independence of the judiciary. The government is preparing to file appeals against the High Court verdict. End Summary

2. (U) On August 29, a 2-member High Court panel declared the fifth amendment to the Bangladesh Constitution void. This verdict rendered illegal the assumption of office by three presidents -- Khandker Mushtaque Ahmed, Justice Abu Sadaat Moahmmad Sayem, and Major general Ziaur Rahman -- and actions taken by their governments under martial law between the August 15, 1975 coup d'etat and the enactment of the amendment in April 1979. The High Court bench, however, observed that the "welfare activities" carried out by the martial law regimes were pardonable. The "welfare" activities might include introduction of the Kuranic words "Bismillahir Rahmanir Rahim" at the beginning of the preamble of the constitution, restoration of multi-party democracy, and press freedom. The full verdict is yet to be made public.

3. (SBU) Alarmed by the High Court verdict, which would put the image of her slain husband and BNP founder Ziaur Rahman in jeopardy, PM Zia asked Attorney General Mohammad Ali to secure a stay by midnight. Ali went to a chamber judge's home and secured the stay shortly before midnight on August 29 until hearing of the petition by the regular appellate panel on August 31. The panel extended the stay order by two months and asked the government to file leave to appeal within this time.

4. (SBU) Ali told Embassy that the High Court order was an unexpected development, as the petitioner's main intention was to regain a movie theater taken over by the Mujib government as an abandoned property. A martial law order had negated a High Court order to hand over the movie theater to its original owner. Ali said Justice A.B.M. Khairul Haque, who presided over the bench that nullified the Fifth Amendment, is known for his bias in favor of the opposition Awami League (AL) and he took advantage of this case to embarrass the government by declaring BNP founder Ziaur Rahman's government illegal at a time when AL was trying to oust the government and the pro-AL attorneys were out to create chaos in the society. He said Haque has violated "judicial discipline" by opening a closed matter and referred to earlier High Court and Appellate panel observations that the fifth amendment had become part of the constitution by long acquiescence of the people and should no longer be a matter of judicial debate. He termed the High Court verdict "mischievous."

5. (U) In press interviews, prominent attorneys gave mixed reactions to the verdict. Some of them appreciated the judgment as "historic" and "bold" as this was the first judgment declaring martial law illegal. Others criticized the judgment for its "vagueness" as to its observations that the "welfare" activities were pardonable. One prominent pro-BNP attorney said the judgment would contribute to instability and chaos in the society. Law Minister Ahmed said the verdict had no value from the perspective of the state, government, and continuation of the constitution. The verdict has created a temporary sensation and has no effect now that the appellate panel has stayed it, he said, adding that the government would appeal it and give its views from the constitutional perspectives.

6. (SBU) Comment: The sharp government reaction to the High Court verdict nullifying the fifth amendment indicates PM Zia's high level of sensitivity to the question of legitimacy of her slain husband's regime and her party's dependence on the popular image he left behind. The unusual verdict given by a panel led by a pro-AL judge and the Attorney General's immediate reading of it in political terms exposes the waning integrity of a politicized judiciary. The controversy, however, may die down for the time being as the appellate panel has stayed the verdict and may take it up for review. End comment.

